No. 82-1435

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CONTRA COSTA THEATRE, INC., a corporation,
Petitioner,

vs.

CITY OF CONCORD, a municipal corporation,
REDEVELOPMENT AGENCY OF THE CITY OF CONCORD,
WILLIAM H. DIXON, RICHARD L. HOLMES, JUNE V. BULMAN,
LAURENCE B. AZEVEDO, RICHARD T. LA POINTE,
FARREL A. STEWART, RICHARD C. STOCKWELL,
PETER H. HIRANO, JAMES MURPHEY, EDWARD H. PHILLIPS,
GARY M. CAMPBELL, HAROLD OSTLING, HARRY L. YORK,
ROBERT T. BARKOFF, LYNNET A. KEIHL, DAVID STEELE,
ROBERT C. BINGHAM, JON Q. REYNOLDS, JR.,
MILTON D. REDFORD, DAVID A. BROWN,
DELTA BINGHAM JOINT VENTURE, a partnership,
REYNOLDS & BROWN, a partnership, and
DOES I through 100,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a hearing on a real property owner's application for a use permit, which application complies with and meets the standards of state and local laws, practices and procedures, involve an interest in, or entitlement to, a benefit which is a form of property right to which federal constitutional guarantees apply in the proceedings of the quasi-judicial city agency which makes the decision on the application?

2. Is the denial of a hearing by a quasi-judicial city agency, on an application for a use permit, a deprivation under color of law of either due process or equal protection, or both, in violation of Title 42 U.S.C. §1983?

3. Is a hearing, the result of which has been predetermined in bad faith by a quasi-judicial body empowered to

make a decision, in conspiracy with other city officials and employees and private parties, for the purpose of depressing the value of real property in anticipation of an eminent domain action, the legal equivalent of denial of a hearing, and, thus, a deprivation of civil rights for which §1983 is a remedy?

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Statutes

No.

IN THE SUPREME COURT

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October Term, 1982

CONTRA COSTA THEATRE, INC.,
a corporation,

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REDEVELOPMENT AGENCY OF THE
CITY OF CONCORD, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Ninth Circuit entered in the above

case on September 8 and November 29, 1982, which affirmed the decision of the United States District Court for the Northern District of California and denied a petition for a rehearing.

CITATIONS OF OPINIONS BELOW

The first order of the Ninth Circuit Court of Appeals is reported at 686 F.2d 798. The order denying the petition for a rehearing is unreported and is printed in Appendix B hereof at pages 1 and 2. The first decision of the District Court of the Northern District of California is reported at 511 F.Supp. 87. The second decision is unreported and is printed in Appendix B, at pages 3 to 6.

JURISDICTION

The order denying rehearing was entered on November 29, 1982. The

jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The statutory provisions are 28 U.S.C. §1254(1) and 42 U.S.C. §1983.

STATEMENT OF THE CASE

Petitioner filed its action for damages under 42 U.S. Code §1983 following the denial by the Planning Commission of the City of Concord, California, of a hearing on an application for a use permit for real property. The defendants (respondents) were the Planning Commissioners, the City Council members, the City Manager, Planning Department employees and private developers, who conspired together to effect the denial of a hearing on the use permit application for the purpose of depressing the value of petitioner's property in anticipation of an eminent

domain proceeding.

Petitioner, owner of a long-term leasehold on which it operated an outdoor theatre, applied for a permit to install additional screens. While the application was pending the City and its Redevelopment Agency adopted a redevelopment plan applicable to the area in which the property lay. Then the respondents began secret discussions among themselves regarding the acquisition of petitioner's property and its sale to the private developers for a so-called redevelopment project. At the hearing on petitioner's application for a use permit, although official reasons were stated for denial, petitioner's evidence was not given consideration and the application was denied pursuant to the prearrangement among the respondents. Four months later, resolutions to condemn

petitioner's property and to approve execution of a contract for sale of the property to the private developers were adopted at the same session of the City Redevelopment Agency. Subsequently, an eminent domain action was instituted and the property was taken, the value of the property being determined on the basis of a single screen, rather than a multiple screen, theatre.

The District Court dismissed petitioner's complaint on the ground that plaintiff had failed to state a claim cognizable under §1983 because it had no "property right" to which constitutional guarantees applied. After an amendment to the complaint the District Court ruled a second time to the same effect. An appeal was taken to the Circuit Court, which affirmed the decision of the District Court by adopting its reasoning

and without writing an opinion. A petition for rehearing was disposed of by the Circuit Court in a brief order.

ARGUMENT

The heart of the matter is the narrow construction imposed by the Circuit Court (adopting the reasoning of the District Court) on the meaning of "property" interests under Board of Regents v. Roth (1972) 408 U.S. 564, 571-2, and Perry v. Sindermann (1972) 408 U.S. 593, 601. Roth said that property interests extend well beyond actual ownership of real estate, chattels or money, and Perry said that they are not limited to a few, rigid technical forms, but denote a broad range of interests that are secured by "existing rules or understandings." Perry further stated (ibid.) that "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the

benefit and that he may invoke at a hearing."

In this case an application by an owner of real property for a permit to use its property in a particular way has been held not to involve a property interest. The Ninth Circuit Court of Appeals has thereby introduced a restriction on Roth and Perry contrary to their interest and meaning and has excluded such a property owner from the protections of due process and equal protection under the United States Constitution.

The erroneous theory is that a property right or interest must be already vested in order to entitle the owner to constitutional protections. This theory conflicts with the decisions of this Court and other Circuit Courts. They hold that it is not necessary for a

right to be vested, but rather that the owner of an interest or right is entitled to protection if: (a) he seeks a definable benefit; (b) sufficiently definite standards are set by law, rule or mutually explicit understanding for determining the granting or denial of the benefit; (c) the administrative or quasi-judicial body has power to make a decision on an application for the benefit by applying the standards to the evidence offered in support of the application; and (d) a hearing before that body is provided for. If those elements can be shown, the benefit is a property interest or right. Then the procedural safeguards of the Constitution apply and the deprivation of those safeguards is a violation of Title 42 U.S.C. §1983.

The status of an interest or entitlement to a benefit as a property right within the definitions of Roth and Perry has been recognized in a variety of situations:

(a) land use permit cases: Rogin v. Bensalem Township (CA3 1980) 616 F.2d 680, at 694; Barbaccia v. County of Santa Clara (D.C.N.D.Cal. 1978) 451 F.Supp. 260; and Cordeco Development Corp. v. Santiago Vasquez (CA1 1976) 539 F.2d 256,

(b) a pension application: Basciano v. Herkimer (CA2 1978) 605 F.2d 605, 609;

(c) welfare allowances: Kelly v. Railroad Retirement Board (CA3 1980) 625 F.2d 486, 489-90; Griffeth v. Detrich (CA9 1979) 603 F.2d 118, 120-2; Metcalf v. Trainor (N.D.Ill. 1979) 472 F.Supp. 576, 592; and Baker v. Cincinnati, etc.

Authority (S.D.Oh. 1980) 490 F.Supp. 520 at 532;

(d) utility services: Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1;

(e) parols: Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1; Winsett v. McGinnes (CA3 1980) 617 F.2d 996 at 1007; and Dumschat v. Board of Pardons, State of Connecticut (CA2 1980) 618 F.2d 216, 218-21,

Perry and Roth are natural developments from such cases as Goldsmith v. United States Board of Tax Appeals (1926) 270 U.S. 117 (involving an accountant's application for admission to practice); Burt v. City of New York (CA2 1946) 156 F.2d 791 (involving an architect's request for a permit); Willner v. Committee on Character & Fitness (1963) 373 U.S. 96 (involving an

application for admission to the Bar); Endler v. Schutzbank (1968) 68 Cal.2d 162, (involving a clerk's desire to work for a licensed business); and Goldberg v. Kelly (1970) 397 U.S. 254, (involving an applicant's request for welfare payments).

The foregoing cases are distinguished from those in which standards or qualifications for entitlement were not established or cases in which the decision makers had unlimited discretion, none of which are subject to constitutional protections. The distinguishable cases are Bishop v. Wood (1976) 426 U.S. 341; McElearney v. University of Illinois (CA7 1979) 612 F.2d 285; Heath v. Redbud Hospital Distict (CA9 1980) 620 F.2d 207; Shamie v. City of Pontiac (CA6 1980) 620 F.2d

118 and Vruno v. Schwarzwalder (CA8 1979) 600 F.2d 124.

I. DENIAL OF HEARING BY A QUASI-JUDICIAL CITY AGENCY ON AN APPLICATION FOR A USE PERMIT IS A DEPRIVATION UNDER COLOR OF LAW OF EITHER DUE PROCESS OR EQUAL PROTECTION, OR BOTH

Either state or local law may create and determine the nature and extent of an entitlement or interest in a benefit which constitutes a property right. Memphis Light, Gas & Water Div. v. Craft, supra, 436 U.S. 9.

The Concord city ordinances and California statutes which permitted the adoption of the ordinances, and the California appellate decisions which have interpreted similar ordinances, and the practices and procedures adopted by the City of Concord constitute the rules or mutually explicit understandings designated by Perry. California Government Code §65901 gives a local

board of zoning adjustment the power and obligation to hear and decide applications. Article X of the Concord Municipal Code states the standards and requires the Planning Commission to make findings. The standards or criteria set forth in the Municipal Code have been held by California appellate decisions to be constitutionally adequate and that a "general welfare" standard is the proper measure which the local zoning commission must apply. City & County of S.F. v. Superior Court (1959) 53 C.2d 236, 249-50; Stoddard v. Edelman (1970) 4 C.A.3d 544; and VanSicklen v. Browne (1971) 15 C.A.3d 122, 127.

The action of a planning commission is quasi-judicial under California law. City of Fairfield v. Superior Court (1975) 14 C.3d 768, 773, note 1; Topanga Assn. for A Scenic

Community v. County of Los Angeles (1974) 11 C.3d 506, 517; Tustin Heights Association v. Board of Supervisors (1959) 170 C.A.2d 619, 633, and, most recently, Arnel Redevelopment Co. v. City of Costa Mesa (1980) 28 C.3d 511.

II. DENIAL OF A HEARING ON AN APPLICATION FOR A USE PERMIT IS A DEPRIVATION OF CONSTITUTIONAL RIGHTS, AND IS A VIOLATION OF TITLE 42 U.S.C. §1983

A hearing before a board which has already made up its mind on a matter and merely conducts its proceeding in order to comply with the formal requirements of law is a sham. It is the same as no hearing at all. Simineo v. School District No. 16 (CA10 1979) 594 F.2d 1353, 1356. The Circuit Court held in Stretten v. Wadsworth Veterans Hospital (CA9 1976) 537 F.2d 361, 367, that the right to a fair hearing is implied in the "existing rules or

understandings" which establish the equivalent of a property right. The failure to allow a fair hearing is, as stated in National Small Shipments etc. v. ICC (CADC 1978) 590 F.2d 345 at 351, "offensive in two fundamental respects: (1) [it] violate[s] the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decisionmaking, and (2) [It] foreclose[s] effective judicial review of the agency's final decision." See also U.S. Lines v. Federal Maritime Commission (CADC 1978) 584 F.2d 519, 542; Environmental Defense Fund, Inc. v. Blum (DCDC 1978) 458 F.Supp. 650, 659-60; Carey v. Quern (CA7 1978) 588 F.2d 230, 232; and Quintana v. Harris (DCNM 1980) 491 F.Supp. 1044, 1047. To these may be added the declaration in Palko v. Connecticut (1937) 302 U.S. 319, at 327: "The

hearing, moreover, must be a real one, not a sham or a pretense."

The defendants are a combination of elected and appointed city officials, city employees, and private developers who benefitted from the city action. Under the recent decision of Dennis v. Sparks (1980) 449 U.S. 24, all may be held liable as conspirators.

Both due process and equal protection was denied. The sham hearing was a denial of due process of law, but the equal protection clause is quite capable of raising essentially procedural due process issues also. Stanley v. Illinois (1972) 405 U.S. 645. The equal protection clause has been applied in §1983 cases, such as Cordeco Development Corp. supra; Burt, supra; Mansell v. Saunders (CA5 1967) 372 F.2d 573; and

Sternaman v. County of McHenry (N.D.Ill. 1978) 454 F.Supp. 240, 247-9)

CONCLUSION

It is not that the District Court and Circuit Court merely misinterpreted or misapplied California law. It is that those courts have attempted to restrict the meaning of property interests stated by this Court in Roth and Perry. The remedy sought is an award of damages for the denial of civil rights, not the issuance of a use permit, for the property has long since been taken in eminent domain. The errors of the Circuit and District Courts in misconceiving Roth and Perry can be corrected only by this Court.

Dated: February 25, 1983.

Respectfully submitted,

William L. Knecht
(Counsel of Record)

SAMUEL L. HOLMES
ANGELL, HOLMES & LEA

ATTORNEYS FOR PETITIONER
CONTRA COSTA THEATRE, INC.

28 U.S.C. §1254. Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

***

42 U.S.C. §1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX B
(Page 1)

DEC 1 1982

FILED

NOV 29 1982

PHILLIP B. GILBERT
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONTRA COSTA THEATRE, INC., a corporation,

Plaintiff/Appellant,

vs.

CITY OF CONCORD, a municipal corporation, REDEVELOPMENT AGENCY OF THE CITY OF CONCORD, WILLIAM M. DIXON, RICHARD L. HOLMES, JUNE V. SULMAN, LAURENCE B. AZEVEDO, RICHARD T. LA POINTE, FARREL A. STEWART, RICHARD C. STOCKWELL, PETER M. MIRAND, JAMES MURPHEY, EDWARD M. PHILLIPS, GARY M. CAMPBELL, HAROLD OSTLING, HARRY L. YORK, ROBERT T. SARKOFF, LYNNET A. KEIHL, DAVID STEELE, ROBERT C. BINGHAM, JON G. REYNOLDS, JR., MILTON D. REDFORD, DAVID A. BROWN, DELTA BINGHAM JOINT VENTURE, a partnership, REYNOLDS & BROWN, a partnership,

Defendants/Appellees.

No. 81-4072

ORDER

BEFORE: CHOY, PREGERSON and POOLE, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

UNITED STATES GOVERNMENT

memorandum

DATE: November 24, 1982

TO: Judge Poole

SUBJECT: Contra Costa Theatre, Inc. v. City of Concord, No. 81-4073

TO: Phillip Winberry, Clerk

I certify that the judges concerned in the above entitled case concur in the attached order. Please file it.

United States Circuit Judge

CFP/lym
Attach.

cc: Judge Choy, w/attach.
Judge Progerson, w/attach.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CONTRA COSTA THEATRE, INC., a Corporation, Plaintiff, v. CITY OF CONCORD, a municipal corporation, et al., Defendants.	NO. C-80-3584-WWS ORDER

Following the Court's prior order of dismissal with leave to amend, plaintiff has now filed an amended complaint which defendants have moved to dismiss.

Defendants are the City of Concord (City), the City's Redevelopment Agency (Agency), individual members of City Council and Agency, City Manager and Assistant City Manager, certain employees of the City's Planning Department, members of the Planning Commission, and private developers (Developers) (partnership and its individual members).

From 1964 until March 22, 1978, plaintiff Contra Costa Theatres (CCT) possessed a leasehold interest in a 13-acre parcel of land in an older section of Concord. This property was subject to the City's General Plan and Central Area Plan, as well as the Agency's Amended Redevelopment Plan. CCT's use of the property for operation of a single screen drive-in theatre conflicted with all 3 plans. (Defendants' Original

Memorandum of P&A, 2:13-16.) A use permit for the drive-in operation had been granted by the City in 1960. On April 16, 1976, CCT filed an application for an amended use permit to expand the scope of its operation to include two or three additional movie screens. (Plaintiff's Amended Complaint, 5:27.) While plaintiff's application was pending, the City Council and Agency publicly adopted the Amended Redevelopment Plan. Discussions between the City and Developers ensued regarding the development of a project on property which included the 13 acres occupied by CCT.

On September 7, 1977, the Planning Commission held a hearing on plaintiff's application for the use permit and denied the application on the ground that it conflicted with the Amended Redevelopment Plan, the General Plan, and the Central Area Plan. Plaintiff did not appeal the denial.

On January 16, 1978, the City Council and Agency passed resolutions condemning plaintiff's property and approving a contract between the Agency and Developers for the sale of plaintiff's property after condemnation.

On March 26, 1978, the City instituted an eminent domain action against plaintiff. Following a jury trial, plaintiff was awarded $750,000 compensation. The court heard CCT's claim that the City and Agency had conspired to deny its use permit application and depress the market value of its property prior to acquisition. It found that CCT had failed to exhaust its remedies, that the Planning Commission had a rational basis for denial of the application irrespective of redevelopment reasons, and that the Planning Commission had informed CCT of those reasons in its denial. An appeal from that decision is pending in the California Court of Appeal.

/

Plaintiff then instituted this action under 42 U.S.C. § 1983, alleging deprivation of its constitutionally protected right to due process and equal protection. On December 1, 1980, this Court dismissed the complaint on the ground that plaintiff had failed to state a claim cognizable under § 1983. Plaintiff was given leave to amend.

In its amended complaint, plaintiff asserts a right to a use permit subject only to compliance with the applicable standards. The denial of the permit is claimed to be a deprivation of a property right.

To the extent that this action is merely a collateral attack on the Planning Commission's denial based on a contention that plaintiff, having complied with the applicable standards, is entitled to a permit as a matter of law, this Court lacks jurisdiction. That issue is one of state law for consideration by a state court with jurisdiction to review the action of the Planning Commission.

To the extent plaintiff claims a constitutional right to a use permit upon compliance with the requirements of state and local laws and regulations, its claim must be rejected for all of the reasons set forth in the Court's prior order of November 26, 1980.

The Constitution does not create property interests, it only protects them. Plaintiff must look to state law or other independent sources of such interests. Perry v. Sinderman, 408 U.S. 593, 602 (1972). The Planning Commission in this case operates under a municipal code which makes the issuance of a permit discretionary and allows the Commission to consider numerous factors including the general welfare of the City. Municipal Code § 10833-34. Plaintiff's claim that it had a protectible interest in the issuance of a permit must therefore be rejected. Jacobson v. Hannifin.

627 F.2d 177 (9th Cir. 1980); see also Vruno v. Schwarzwalder, 600 F.2d 124 (8th Cir. 1979).

Defendants' motions to dismiss are therefore granted.

IT IS SO ORDERED.

DATED: January 3[illegible], 1981

WILLIAM J SCHWARZER
United States District Judge

No. 82-1435

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CONTRA COSTA THEATRE, INC., a corporation,
Petitioner,

VS.

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Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS

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Defendants/Appellees.

No. 81-4070

ORDER

BEFORE: CHOY, PREGERSON and POOLE, Circuit Judges.

[filed November 29, 1982]

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

APPENDIX B
(page 3)

UNITED STATES GOVERNMENT
MEMORANDUM

DATE: November 24, 1982

FROM: Judge Poole

SUBJECT: Contra Costa Theatre, Inc. v. City of Concord, No. 81-4070

TO: Phillip Winberry, Clerk

I certify that the judges concerned in the above-entitled case concur in the attached order. Please file it.

/s/
Unites States Circuit Judge

CFP/lym
Attach.

cc: Judge Choy, w/attach.
Judge Pregerson, w/attach.

APPENDIX B
(page 4)

UNITED STATES COURT OF APPEALS

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Defendants/Appellees.

No. 81-4070

DC# C-80-3564-WWS

OPINION

[filed September 8, 1982]

BEFORE: CHOY, PREGERSON and POOLE, Circuit Judges.

PER CURIAM:

On the basis of the district court's opinion, reported at 511 F.Supp. 87 (N.D.Cal. 1980), the decision of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CONTRA COSTA THEATRE, INC.,
a Corporation,

Plaintiff,

v.

CITY OF CONCORD, a municipal
corporation, et al.,

Defendants.

No. C-80-3564-WWS

ORDER

Following the Court's prior order of dismissal with leave to amend, plaintiff has now filed an amended complaint which defendants have moved to dismiss.

Defendants are the City of Concord (City), the City's Redevelopment Agency (Agency), individual members of City Council and Agency, City Manager and Assistant City Manager, certain employees

[filed January 30, 1981]

of the City's Planning Department, members of the Planning Commission, and private developers (Developers) (partnership and its individual members).

From 1964 until March 22, 1978, plaintiff Contra Costa Theatres (CCT) possessed a leasehold interest in a 13-acre parcel of land in an older section of Concord. This property was subject to the City's General Plan and Central Area Plan, as well as the Agency's Amended Redevelopment Plan. CCT's use of the property for operation of a single screen drive-in theatre conflicted with all 3 plans. (Defendants' Original Memorandum of P&A, 2:13-16.) A use permit for the drive-in operation had been granted by the City in 1960. On April 16, 1976, CCT filed an application for an amended use permit to expand the scope of its operation to

include two or three additional movie screens. (Plaintiff's Amended Complaint, 527) While plaintiff's application was pending, the City Council nd Agency publicly adopted the Amended Redevelopment Plan. Discussions between the City and Developers ensued regarding the development of a project on property which included the 13 acres occupied by CCT.

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On January 16, 1978, the City Council and Agency passed resolutions condemning plaintiff's property and

approving a contract between the Agency and Developers for the sale of plaintiff's property after condemnation.

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To the extent plaintiff claims a constitutional right to a use permit upon compliance with the requirements of state and local laws and regulations, its claim must be rejected for all of the reasons set forth in the Court's prior order of November 26, 1980.

The Constitution does not create property interests, it only protects them. Plaintiff must look to state law or other independent sources of such interests. Perry v. Sinderman, 408 U.S. 593, 602 (1972). The Planning Commission in this case operates under a municipal code which makes the issuance of a permit discretionary and allows the Commission

to consider numerous factors including the general welfare of the City. Municipal Code § 10833-34. Plaintiff's claim that it had a protectible interest in the issuance of a permit must therefore be rejected. Jacobson v. Hannifin, 627 F.2d 177 (9th Cir. 1980); see also Vruno v. Schwarzwalder, 600 F.2d 124 (8th Cir. 1979).

Defendants' motions to dismiss are therefore granted.

IT IS SO ORDERED.

DATED: January 30, 1981.

/s/
WILLIAM W. SCHWARZER
United States District Judge

No. 82-1435

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CONTRA COSTA THEATRE, INC., a corporation,
Petitioner,

vs.

CITY OF CONCORD, a municipal corporation,
REDEVELOPMENT AGENCY OF THE CITY OF CONCORD,
WILLIAM H. DIXON, RICHARD L. HOLMES, JUNE V. BULMAN,
LAURENCE B. AZEVEDO, RICHARD T. LA POINTE,
FARREL A. STEWART, RICHARD C. STOCKWELL,
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GARY M. CAMPBELL, HAROLD OSTLING, HARRY L. YORK,
ROBERT T. BARKOFF, LYNNET A. KEIHL, DAVID STEELE,
ROBERT C. BINGHAM, JON Q. REYNOLDS, JR.,
MILTON D. REDFORD, DAVID A. BROWN,
DELTA BINGHAM JOINT VENTURE, a partnership,
REYNOLDS & BROWN, a partnership, and
DOES I through 100,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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I

STATEMENT OF THE CASE

The petitioner seeks review of the dismissal of this case by the United States District Court for the Northern District of California. On appeal, the Court of Appeals for the Ninth Circuit upheld the District Court's dismissal

in a one sentence opinion expressing the Court of Appeals' agreement with the District Court opinion.

This action is a not very subtle attempt to circumvent rulings in a state court condemnation proceedings regarding California land use law. Petitioner operated a single-screen drive-in theatre in the City of Concord, California. When opened in 1960, the drive-in conformed to existing City land use plans and policies. However, those plans had changed over the years. In 1977, when Petitioner applied to the City for a land use permit to expand the theater by adding several additional screens, the Planning Commission denied the permit because the expanded use was not in conformance with the City's General Plan, with the City's specific plan for the area, or with the Redevelopment Agency's Central Concord Redevelopment Plan.[1] Although having a right to do so petitioner did not seek any administrative or judicial relief to invalidate the permit denial.

Several months following denial of the use permit, the Redevelopment Agency brought a state court eminent domain action to acquire petitioner's leasehold interest in the property on which it operated the drive-in. In that action petitioner sought compensation of $2.25 million based on the value of a multiple-screen drive-in. Petitioner alleged that there was a conspiracy to deny the use permit so as to hold down the value of the property in the later condemnation. Petitioner argued that because

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[1]The denial of the permit had no effect on the operation of the existing single-screen drive-in. That use was a pre-existing nonconforming use which was permitted to continue despite subsequent changes in plans which would have otherwise prohibited the use. Petitioner, therefore, has not claimed nor could it claim that the denial of the use permit constituted a taking of its property.

the conspiracy constituted unreasonable precondemnation activity under the California Supreme Court ruling in *Klopping v. City of Whittier,* 8 Cal.3d 39 (1972), it was entitled to value its property in the condemnation as if the use permit had been approved. The state trial court, after hearing petitioner's evidence of the alleged unreasonable precondemnation activity, held that petitioner was not entitled to compensation based on that alleged activity. Petitioner was awarded compensation of $750,000 for the single-screen drive-in.

After the state court judgment was entered, petitioner appealed the judgment to the California Court of Appeal and then brought this action seeking the $1.5 million difference between the $750,000 awarded in the state court action and the $2.25 million it had sought in that action.

Although styled as a civil rights action under 42 U.S.C. Section 1983, this action alleges the same facts as were alleged in the state court condemnation action as grounds for compensation for alleged unreasonable precondemnation activity. In each case petitioner alleged a grand conspiracy to deny the use permit so as to hold down the value of the drive-in in the later condemnation action. See Petition for Writ of Certiorari, Appendix B at 6-10; Petition for Writ of Certiorari at 3-5; *Redevelopment Agency v. Contra Costa Theatre, Inc.,* 135 Cal.App.3d 73 (1982).

Subsequent to the Ninth Circuit Court of Appeals decision in this case, the California Court of Appeal decided petitioner's appeal of the state court condemnation judgment. *Redevelopment Agency v. Contra Costa Theatre,*

Inc., 135 Cal.App.3d 73 (1982). In holding that the evidence before the trial court could not support damages for the Planning Commission's failure to approve the use permit, the California Court of Appeals noted:

> Here, the evidence submitted to the trial court showed no more than a denial of appellant's application for a use permit because of a proposed use of the subject property inconsistent with the recently drafted city plans for the area. No conspiracy among city officials was established; no intent to diminish the value of appellant's leasehold interest is revealed by the evidence.

135 Cal.App.3d at 81-82.

Petitioner sought California Supreme Court review of the California Court of Appeal decision, but review was denied on November 24, 1982. Minutes of the California Supreme Court for November 24, 1982, Volume 34, 1982 California Official Reports Advance Sheets (December 21, 1982).

II

ARGUMENT

A. The Lower Courts Correctly Held That Petitioner Had No Protected Property Right

The District Court's ruling, upheld by the Court of Appeals, that petitioner had no protected property right with respect to the use permit decision is in full accord with the law on this point. To determine whether a litigant has a protected property right under *Board of Regents v. Roth*, 408, U.S. 564 (1972), the courts have focused upon the extent of the discretion allowed to the government

decision-maker. *Russell v. Landrieu,* 621 F.2d 1037 (9th Cir. 1980); *United Land Corporation v. Clarke,* 613 F.2d 497 (4th Cir. 1980); *Griffeth v. Dietrich,* 603 F.2d 118 (9th Cir. 1979). Where the government decision-making body has broad discretion to decide an issue either in favor of or against the applicant, the applicant has no legitimate expectation or claim of entitlement to a favorable decision. The applicant, therefore, has no protected property right. *Board of Regents v. Roth,* supra at 557.

For example, in *Board of Regents v. Roth,* supra, this Court held that a college teacher had no protected property right in his job where his employer had broad discretion not to rehire him. Similarly, in *United Land Corp. of America v. Clarke,* supra, the court held that a permit applicant had no protected property right with respect to a land use permit where the responsible official was given broad discretion to rule on permits in order to "accomplish the objectives of the ordinance" which objectives included "promoting public health and welfare." See also *Russell v. Landrieu,* supra, (Tenants in federally owned housing did not have protected property right with respect to sale of housing where Secretary of Housing and Urban development has broad discretion to dispose of housing in a manner which is consistent with the objectives and priorities of the National Housing Act.); *Jacobson v. Hanifin,* 627 F.2d 177 (9th Cir. 1980). (No protected property right in obtaining gambling permit where Gambling Commission has substantial discretion to grant or deny permit); *Shamie v. City of Pontiac,* 620 F.2d 118 (6th Cir. 1980) (No protected property interest in obtaining liquor license where city regulations give broad discretion to issue or reject permit.)

In this case, the decisional rules of the City of Concord with respect to grant or denial of use permits involve extremely broad discretion. The City of Concord Municipal Code sets forth a broad standard which authorizes denial of a use permit if the proposed use will be detrimental to the health, safety or welfare of the City or the surrounding neighborhood. See Petition for Writ of Certiorari, Appendix B at 11-12. Like the teacher in *Board of Regents v. Roth*, supra, whose employer could refuse to rehire him for virtually any reason, petitioner was in a position where its use permit application could be denied for virtually any reason. No matter how carefully petitioner may have planned its proposed drive-in expansion, the City could still reject the permit because of the detrimental impact on the surrounding area of the light, noise and traffic generated.[2]

Petitioner's lack of any legitimate expectation of or entitlement to a use permit is further evidenced in this particular case by the fact that the proposed use was not in conformance with the City's General Plan which governed use and development of petitioner's property. Petition for Writ of Certiorari, Appendix B at 8. California law imposes the very rational requirement that a city's zoning actions conform to its general plan. Calif. Government Code Section 65860. Thus, at the time the Planning Commission made its use permit decision, petitioner

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[2]See *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *HFH Ltd. v. Superior Court*, 15 Cal.3d 508 (1975) which establish a general rule that a landowner normally has no vested right to application of a particular land use classification to his or her property.

could hardly be said to have had a legitimate expectation that the Planning Commission would approve a permit for a use which would violate the City's General Plan.

In the situation posed in this case where the decisional rules create broad discretion based on a general health, safety and welfare standard and where the proposed use does not conform to the relevant land use plans, there can be no legitimate expectation of issuance of a use permit. Therefore, the District Court in dismissing the action, and the Court of Appeal in upholding the dismissal, acted correctly.

B. The California Court of Appeal Decision Disposes of this Action

In the Court of Appeal and the District Court, respondents argued that the abstention doctrine set forth in *Younger v. Harris,* 401 U.S. 37 (1971), and its progeny provided grounds for dismissal. That argument was made because the filing of this action threatened to interfere with the then pending state court eminent domain action in which petitioner had the opportunity to, and in fact did, raise the same issues it raises here. The final disposition of the state condemnation action has taken this case a step beyond the principles of comity and federalism expressed in *Younger* and implicated principles of res judicata.

In the state court action, petitioner attempted to prove that there was a conspiracy to deny the use permit for the purpose of holding down the value of the property. The trier of fact concluded that no such conspiracy or purpose existed. Petitioner cannot now have the prover-

bial second bite of the apple in this action. Application of rules of res judicata prevent petitioner from now going into federal court and seeking to prove for a second time the existence of the alleged conspiracy which formed the basis for its claim of unreasonable precondemnation activity in the condemnation case and its claim in this case. *Federated Department Stores, Inc. v. Motie,* 452 U.S. 394 (1981); *Allen v. McCurry,* 449 U.S. 90 (1980); *Montana v. U.S.,* 440 U.S. 147 (1979); *Angel v. Bullington,* 330 U.S. 583 (1946); *Cromwell v. County of Sac,* 94 U.S. 351 (1876).

Thus, even if this case were remanded to the District Court, the intervening final decision of the California courts would now dictate dismissal of the case.

III

CONCLUSION

This case was decided correctly by the lower federal courts and does not present a conflict among the various courts of appeal or a pressing issue which requires decision of this Court. This litigation had its origin in a state court condemnation action in which petitioner had a full and fair opportunity to prove its alleged conspiracy and recover the damages allegedly flowing from that conspiracy.

Petitioner's lack of protected property right to issuance of the use permit and the final decision in the state court condemnation action provide ample grounds for keeping the federal courts out of this dispute. The District Court's dismissal of this action, upheld by the Court of Appeals, properly allowed the litigation to run its course in state

court without interference. That dismissal, therefore, should be upheld and the petition for writ of certiorari denied.

Dated: March 25, 1983.

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QUESTIONS PRESENTED

1. Did the United States District Court for the Northern District of California and the Court of Appeals for the Ninth Circuit correctly conclude that under California law and the City of Concord municipal ordinances, Contra Costa Theatre, Inc. had no legitimate entitlement to a use permit for a proposed drive-in theatre which conflicted with existing City use plans?

2. Was there a rational basis for the City's denial of the use permit?

3. Is the petition appropriate in light of the now final state court decision entitled *Redevelopment Agency v. Contra Costa Theatre, Inc.*, 135 Cal.App.3d 73, 185 Cal.Rptr. 159 (1982), petition for hearing to California Supreme Court denied November 14, 1982?

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OPINIONS BELOW

The orders of the Court of Appeal for the Ninth Circuit and the opinion of the District Court for the Northern District Court for the Northern District of California are identified in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE

Petitioner Contra Costa Theatre (CCT) is a drive-in theatre operator which until March of 1978 possessed a leasehold interest in a certain parcel of property located in the City of Concord, California (City). Respondents include the City, the City's Redevelopment Agency (Agency), individual members of the City Council and Agency, the City Manager and Assistant Manager, certain employees of the City's planning department and members of the planning commission. Also named are certain private individuals engaged in the redevelopment of the disputed parcel (Developers).

Until March of 1978, CCT operated a single-screen drive-in theatre on the disputed property. (Appendix B to Petition, p. 7) The property, which is located in the central business area of the City, is part of an older section of the City designated for redevelopment. As such, it was subject not only to the City's general plan and central area plan, but also the amended redevelopment plan. (Appendix B to Petition, p. 7)

In 1976, CCT applied for a permit to expand the intensity and scope of its operation to include two additional highly visible drive-in theatre screens. (Appendix B to Petition, p. 7) This proposed expansion conflicted not only with the City's general and central area plans, but also with the City's amended redevelopment plan. (Appendix B to Petition, p. 8; *Redevelopment Agency v. Contra Costa Theatre, Inc.*, 135 Cal.App.3d 73, 81-82, 185 Cal.Rptr. 159 (1982), hearing denied by California Supreme Court, November 14, 1982.)

On September 7, 1977, the City's planning commission held a hearing on CCT's application and denied it because, *inter alia,* it conflicted with the amended redevelopment plan, the general plan and the central area plan. *Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* 135 Cal. App.3d 74. The denial did not affect any existing use by CCT. Although the denial was subject to administrative appeal and the hearing was subject to state judicial review, CCT did not appeal or seek review. (Appendix B to Petition, p.8)

In accordance with its redevelopment plan, the Agency instituted an eminent domain action in Contra Costa County Superior Court on March 22, 1978, naming CCT as one of the defendants. By way of response to these proceedings, CCT appeared and sought damages and raised the same claims presented here, including the claim that the City and Agency conspired to deny its use permit application in order to depress the leasehold's market value prior to acquisition. *Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* 135 Cal.App.3d 73.

In the course of the trial of the state court action, the state court heard CCT's claim that the City and Agency had conspired to improperly depress the market value of its leasehold. The state court ruled against CCT on these issues. The state court also found that the planning commission had valid reasons for the denial of CCT's application, independent of the redevelopment reasons, and that CCT had failed to exhaust its administrative remedies. (Appendix B to Petition, p. 7; *Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* 135 Cal.App.3d 81-82.) Following entry of judgment in favor of the City on the

improper conduct charges, the issue of just compensation was tried to a jury and CCT was awarded $750,000.00 for its leasehold interest. (*Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* at 135 Cal.App.3d 85.)

On June 5, 1980, CCT appealed from the state court judgment. On September 5, 1980, CCT filed its present complaint in the United States District Court for the Northern District of California seeking damages equivalent to the difference between plaintiff's claim in the state action and the award in the state action.

On August 17, 1982, the California Court of Appeal affirmed the state court judgment, finding no evidence of improper conduct in the City's denial of the use permit. *Redevelopment Agency v. Contra Costa Theatre, Inc.,* 135 Cal.App.3d 73, 185 Cal.Rptr. 159 (1982). CCT's petition for hearing was denied by the California Supreme Court on November 14, 1982.

Petitioners federal action was dismissed by the U. S. District Court for the Northern District of California, Judge William Schwarzer presiding, on January 30, 1981. (Appendix B to Petition, p. 6) On September 28, 1982, the United States Court of Appeals for the Ninth Circuit affirmed the dismissal.

ARGUMENT

CCT's petition should be denied. It presents no conflict of decision between the Circuit Courts nor any significant question of federal law. Most importantly, it is without merit.

Arguing that the District Court and Circuit Court too narrowly evaluated its claim of a property right, CCT

seeks to ensnare this Court in a review of state law and municipal ordinances and reevaluation of a municipal agency's discretionary administrative decision that was patently correct. Indeed, the propriety of that administrative decision and the present petition's lack of merit are demonstrated by a now final state court decision involving substantially identical claims regarding the denial of the disputed use permit.

I

THE DECISION BELOW WAS CORRECT—CCT HAD NO PROPERTY ENTITLEMENT UNDER THE APPLICABLE ORDINANCES AND PLANS

The decisions of the District Court and Circuit Court are patently correct. CCT had no entitlement under municipal or state law to expand the number of drive-in theatre screens in downtown Concord, a use which conflicted with the City and redevelopment plans.

CCT predicates its federal claim upon its assertion that it was deprived of a property right without due process of law. However, before a constitutionally cognizable property interest can arise, there must be more than a mere unilateral expectation. There must first exist under state law a legitimate entitlement to the benefit claimed. *Board of Regents v. Roth*, 408 U.S. 564, 569, 33 L.Ed.2d 548 (1972). There can be no doubt here that CCT had no legitimate entitlement to the disputed use permit under the applicable ordinances and use plans.

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of "interests that a person has *already acquired*" in specific benefits. *Board*

of Regents v. Roth, 408 U.S. 564, 576, 33 L.Ed.2d 548 (1972). There were no preexisting rights affected here. CCT did not operate multiple theatres at the time of the denial. CCT's existing operation of a single theatre was not affected by the denial. Rather, the denial did nothing more than leave the existing ordinances, planning restrictions and uses in effect. The granting or denying of a use or conditional use permit is discretionary and no due process rights are implicated by such a denial. *See, e.g., Regan v. Counsel of the City of San Mateo*, 42 Cal.App.2d 801, 806 (1941).

CCT's application was subject to the Concord Municipal Code. That ordinance gives the planning commission the widest possible discretion in making its decision. (Appendix B to Petition, p. 11) Under the City's ordinance, no public hearing is required. Concord's municipal code allows the Planning Commission to consider numerous factors and to deny an application if it finds it would be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City (Appendix B to Petition, p. 11). Of course, in this case, it is established that additional drive-in theatre screens in the downtown area would, *inter alia*, conflict with the area's redevelopment plan, a plan which is specifically designated to promote a public welfare.

It is well established that where, as here, the decisional authority is vested with broad discretion, no protected property right is created. *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed.2d 684 (1976) (no protected property right where no guarantee of continued employment); *Board of Regents v. Roth, supra*, at 408 U.S. 557; *Slocum v. Georgia State*

Board of Pardons & Paroles, 678 F.2d 940, 941 (11th Cir. 1982) (no legitimate claim of entitlement where state law merely established guidelines for consideration of parole) *Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982) (applicant for discretionary firearm permit had no entitlement and no property right under applicable California laws); *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980) (applicant had no property interest in gaming permit where gaming commission's exercise of discretion need only have "reasonable" basis); *United Land Corp. of America v. Clarke*, 613 F.2d 497 (4th Cir. 1980) (property owner had no entitlement or right in land use permit where administrative decision subject to substantial discretion); *Mosher v. Beirne*, 357 F.2d 638, 641 (8th Cir. 1966) (no denial of due process where ordinance required permit to operate dance hall and vested decisional authority with broad discretion); *Keystone Cable-Vision Corp. v. FCC*, 464 F. Supp. 740, 744 (W.D. Pa. 1979) (no property right in already issued building permit subject to revocation). It is precisely this type of broad, discretionary authority which exists here and which defeats CCT's claim of an entitlement to the conflicting use.

CCT's claim fails not only because CCT had no legitimate entitlement to or property right in the disputed permit, but also because there is no plausible basis for disputing the denial. In order to state a claim for denial of due process, it is necessary to establish not only an invasion of a property interest, but also that the purported justification for the invasion was improper or at least disputable. *Rainbow Valley Citrus Corp. v. Federal Crop Insurance Corp.*,

506 F.2d 467 (9th Cir. 1974). In this case, the propriety of the denial is beyond dispute and CCT's claim must be rejected.

CCT's ancillary claim of a denial of equal protection is likewise without merit. As the District Court correctly noted, CCT makes no claim that use permits for drive-in theatres were issued to any other similarly situated owners in the redevelopment area nor that the permit denial involved any suspect classification or fundamental rights. Accordingly, the City's denial of CCT's use permit application must stand unless it is totally lacking a rational justification. *United Land Corp. v. Clarke, supra,* 613 F.2d at 500; *Fielder v. Cleland,* 433 F.Supp. 115, 118 (E.D. Mich. 1977), *affirmed,* 577 F.2d 740 (6th Cir. 1978). In the present case, there was undisputably a rational basis for the denial; the conflict of the proposed theatre expansion with the City's governing plans is established. *Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* 135 Cal.App. 3d 73.

II

CCT'S CLAIM IS UNSUPPORTABLE IN LIGHT OF THE STATE COURT DECISION

In this case, CCT asserts that it was improperly denied a use permit for expansion of a number of screens at its downtown drive-in theatre by reason of a precondemnation conspiracy on the part of the City to depress the leasehold's value. Those same claims were raised by CCT in the case of *Redevelopment Agency v. Contra Costa County Theatre, Inc.,* 135 Cal.App.3d 73, 185 Cal.Rptr. 159 (1982), and were rejected. The state court ruling is both dispositive of CCT's conspiracy claims and final.

In the state court action, as here, CCT sought damages equal to the alleged difference in market value between a single-screen and a multiple-screen theatre. *See, Redevelopment Agency v. Contra Costa Theatre, Inc., supra,* 135 Cal.App.3d 77. In the state court action, as here, CCT claimed and sought to prove a conspiracy between the City and various private parties. *Id.* In the state court action, as here, CCT alleged that the City improperly heard and denied its application for a use permit in order to depress the market value of its property before condemnation. *Id.* The trial court in the state action heard and rejected those claims. In affirming that rejection, the California Court of Appeal stated at 135 Cal.App.3d 81-82:

> Here the evidence submitted to the trial court showed no more than a denial of appellant's application for a use permit because of a proposed use of the property inconsistent with the recently drafted City plans for the area. No conspiracy among city officials was established; no intent to diminish the value of appellant's leasehold interest was revealed by the evidence.

Since the state court ruling on the merits is now final, Petitioner's claim that it had an "entitlement" to such a permit or that there was any improper denial or conspiracy is necessarily moot. *Kremer v. Chemical Construction Corp.,* ..... U.S. ....., 72 L.Ed.2d 262 (1982), *reh. den.; Allen v. McCurry,* 449 U.S. 90, 66 L.Ed.2d 308 (1980).

Appellant's claim that it had an "entitlement" to construct additional drive-in theatre screens in a downtown area in contravention of the applicable municipal ordi-

nances and plans is unsupportable. Moreover, in light of the now final California Court of Appeal's decision, any claim relating to that decision or the propriety of the determination is now moot. CCT's petition for hearing should be denied.

Dated: March 25, 1983.

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